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"SOME SUGGESTED CHANGES IN THE LAW OF WILLS IN VIRGINIA."*

In the making of a will man attains to something of the power of the immortal. By legislative sanction he is permitted to project his dead hand into the future and to control the destinies of persons not even born. Under existing law in Virginia, there are few restrictions upon his absolute independence in the disposition of his property, and the courts will ndeavor to effectuate even his most cruel caprices. The very child of his loins may be cut off without a shilling, and the wife of his bosom may be treated with scant consideration.

The exercise of this privilege to speak with a controlling voice in the disposition and use of one's own property long after death was appreciated very highly by the inventors of the modern will: the Romans,—for Sir Henry Sumner Maine tells us that "to the Romans no evil seems to have been a heavier visitation than the forfeiture of testamentary privilege; no curse seems to have been bitterer than that imprecated upon an enemy, 'that he might die without a will.' "

Indeed, man no sooner originated property and property rights than he asserted the wish to control the disposition of his property after death. Blackstone found instances of testamentary disposition in the Book of Genesis (2 Blk. Com. 490); Solon introduced wills into Greece; while the Romans had devised a mode of conveying property by will even before the art of letters was known. In the apt phrase of Schouler, we find the right of testamentary disposition "coeval with civilization itself, and so close in fact upon the origin of property and property rights as not to be essentially separated in point of antiquity." [1]

*A paper read before the Virginia State Bar Association at its meeting at Old Point Comfort in July, 1916. The Association directed the paper to be referred to the Revisors of the Code of Virginia for attention.

1. Schouler on Wills, 2nd Ed. § 13.

Indeed, Sir Henry Maine has found that the institution of the will, next only to the contract, has exercised the greatest influence in transforming human society.

In tender realization of the solemnity and importance of a will, the courts have struggled in countless cases to effectuate the intent of the testator. The modern will contests convince us that it is true now, as it was in Lord Coke's day, "that wills, and the construction of them, do more perplex a man than any other learning, and to make a certain construction of them exceedeth jurisprudentum artem." So great is this perplexity, that we find even a good lawyer like Samuel J. Tilden making a mistake that deprived New York of the benefits of his will.[2] And yet the laity little realizes the anxiety of the courts to sustain a will whenever possible.

Even in Virginia, where few and insufficient restrictions are thrown about the solemn act of speaking into the universal ear the final word on the disposition of a man's property,—we frequently hear the charge that the courts either break wills or construe away the intent of the testator. The attitude of the average man in the street is not unlike that of the testator of whom Horace Walpole writes that he prefaced his will with these words:

"In the name of God. Amen! I am of sound mind. This is my last will and testament and I desire the courts not to trouble themselves to make another for me."

Whereupon, the courts, in tender realization of the apprehensions of the testator, proceeded to make quite another and different will for him.

The late Ezra C. Bartlett, who died in New York in 1912, was equally suspicious of lawyers, judges, and wives, and in his last will and testament gave this solemn admonition to the beneficiaries in his will:

"I hereby particularly warn you against Probate Judges and Attorneys at Law, and sincerely trust you will not have occasion to consult or employ the latter in regard to this instrument. My personal experience in dealings, social and otherwise, with lawyers has been extensive, and careful observation in other in-

2. Tilden *v.* Green, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33.

stances has convinced me that they are all dangerous crooks, only disguised, and expressly educated and trained to obtain one's confidence in order that they may defraud and rob with impunity.

"I further declare that I am unmarried, and that no one has any moral or legal right to participate in the distribution of my estate, or the proceeds thereof, on the ground of, or growing out of any alleged intermarriage with me heretofore contracted, and I expressly exclude all such from participating in any manner in my estate or the proceeds derived therefrom." [3]

The ancient Greek pronounced the most terrifying curses upon him who should break his will, and the horror of intestacy haunts many men in their last moments.

It is the recognition of this feeling that has caused the Legislature in all modern States to make a will that is usually wise and natural for that man who does not make a will for himself. In a certain sense, therefore, no man can now die without a will. The statutes of descent and distribution are based upon the natural affections and their very object is to dispose of one's property in the way that a majority of men would do were they to make a special will. In cases of intestacy, as well as of testacy, therefore, the anxious purpose of the law is to follow the wishes of the owner in disposing of his property,—the only difference being that in the one case the wish is expressed and in the other it is presumed. In both cases, however, the succession follows the law and it is entirely within the power of the Legislature to alter the course of succession at any time before rights become vested and protected by constitutional limitations. Indeed, as said by Judge Lee in Eyre *v.* Jacob, 14 Gratt. 422:

"The Legislature may tomorrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions, and declare that upon the death of a party, his property shall be applied to the payment of his debts and the residue appropriated to public uses."

It is true that a broken will is often a tragedy; yet it is not a tragedy so terrible as that which must disturb the eternal

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3. Virgil M. Harris in "The Green Bag," cited in 20 Va. Law Reg. 577.

sleep of the dead when a will is either forged or destroyed successfully. Indeed, when we study the liberality of the courts in sustaining wills and note the comparative informality of the procedure required for their execution and probate in Virginia, we fear that injustice is oftener unknowingly done in sustaining wills, than in refusing to give legal sanction to genuine papers that are void for informality, ambiguity or legislative prohibition.

When we realize the cruel consequences that may result to innocent persons from the successful probate of a spurious will, we are surprised that the Legislature of Virginia has been content for more than one hundred and fifty years to throw no safeguards about the execution and proof of a holograph will, and, so, first, in the suggested changes of the law of wills in Virginia, I will consider legislative safeguards that should be provided against the successful forgery of a holograph will.

THE HOLOGRAPH WILL IN VIRGINIA.

Since the first statute was enacted in Virginia in October, 1748,[4] a will wholly written by the testator is neither required to be witnessed nor the handwriting proved at the formal probate by any prescribed number of witnesses. Indeed, while the statute of 1748 required the will to be "wholly writ by said devisor's own hand," or else witnessed, the present statute simply provides that the will shall "be wholly written by the testator" [5] and Professor Raleigh C. Minor suggests as undetermined questions "whether this provision requires that the will be in the testator's own handwriting, or whether it is sufficient if he

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4. The first statute in Virginia providing for devises and bequests of lands was enacted in October, 1748, being the twenty-second year of Geo. 2, and provided as follows: "Clause VII—And be it further enacted by the authority aforesaid, that all devises and bequests of any lands or tenements, shall be in writing, and signed by the party devising the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in the presence of the said devisor by two or more credible witnesses, or shall be wholly writ by said devisor's own hand, or else they shall be void and of no effect." 5 Henn. Stat. at Large, p. 456.

5. Va. Code, 1904, § 2525.

traces over the words written by another, or if he write the will on a typewriter." [6]

The holograph will is wholly unknown to the English Statutes from which we derived our statute of wills and an unwitnessed will, even though wholly in the handwriting of the testator, could not be probated in England today.

Judge Allen says, in Waller *v.* Waller, 42 Va. (1 Gratt.) 454, 474, that "our statute of wills is a transcript of the statute of 29 Charles 2, with the exception that it dispenses with the subscribing witnesses in cases of wills wholly in the handwriting of the testator, a provision not contained in the English statute. The statute of 29 Charles 2 required that the will should be in writing; signed by the devisor, or some other person in his presence and by his direction; and that it should be attested and subscribed by three or more credible witnesses in his presence."

Why the Virginia Legislature required only two witnesses instead of the three that were necessary under the English statute, and why it inserted the provision (not found in the English statute) that wills wholly in the handwriting of the testator need not be witnessed at all, is not explained in an entirely satisfactory manner in the cases.

Judge Allen himself recognized the danger of forgery. "Yet it is deemed sufficient," he says, "in holograph wills to guard against the setting up forged papers as wills of decedents that the identity or connection of the instrument be attained by proof of his handwriting." "For," says Judge Allen, "though his signature may be readily forged, there would be much difficulty in successfully imitating the handwriting of another throughout the whole instrument." [7]

In that very case of Waller *v.* Waller, Mr. Robinson, for the appellants, says that the court cannot fail to inquire into the reasons which induced the Legislature to place a will wholly written by the testator on the same footing with wills attested by two or more witnesses. As to the proof, there may be perjury in both cases, but what the Legislature meant to do was to sanction a will so written and signed, that, supposing it to be

6. Minor on Real Property, Vol. 2, § 1235.
7. Waller *v.* Waller, 42 Va. (1 Gratt.) 454, 474.

genuine, it furnished as satisfactory evidence of its being the last will and testament of the deceased as a writing acknowledged before witnesses.

Evidently the British Parliament, and nearly two-thirds of the Legislatures of the States of this Union, in requiring attesting witnesses to holograph wills, as well as other wills, do not agree that it is safe in any event to dispense with the acknowledgment of the will by the testator before at least two subscribing witnesses. In the last edition (5th) of Schouler on Wills, that accepted authority says this:

"Under statutes like those of England, Massachusetts, and New York, at the present day, and, indeed, by the policy which now prevails throughout England and most parts of the United States, holograph wills, or those written by the testator's own hand, stand on no privileged footing, but require to be attested like any other testaments." [8]

I find this to be the law in all the New England States, in New York, New Jersey, Maryland, Alabama, Colorado, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, New Mexico, Ohio, Oregon, Pennsylvania, South Carolina, Washington, Wisconsin.[9]

"But in a few of the States," says Schouler, "holograph wills are expressly recognized, following, usually, the Louisiana Civil Code on this subject, but in some instances originating in the old English Colonial law." [10]

Of those States that dispense with subscribing witnesses to holograph wills, Arkansas, North Carolina, and Tennessee, require that the handwriting and signature be proved by three witnesses, while North Carolina and Tennessee offer additional safeguards against forgery by the provision that the holograph document must be found in the valuable papers of the deceased or lodged with a third person for safekeeping.

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8. See also note on the formalities of making a will in England and in Virginia, 2 Va. Law Reg. 469.

9. See Digest of laws in respective States of the Union in Martindale's Law Directory, 1916.

10. Schouler on Wills (5th. Ed.), § 255.

None of these restrictions on the proof of a holograph will exist in Virginia. A similar faith in the handwriting alone as a protection against fraud and forgery appears to exist in the following States where holograph wills can be probated without subscribing witnesses: Arizona, California, Kentucky, Louisiana, Montana, Mississippi, Nevada, North Dakota, Oklahoma, South Dakota, Texas, Utah, West Virginia, Wyoming. These, with Virginia, Arkansas, North Carolina, and Tennessee, are the only States in the Union that regard holograph wills as privileged for proof without the presence of subscribing witnesses.[11]

In this connection it may be remarked that while holograph wills are not privileged in Pennsylvania as to proof, the Pennsylvania statute appears to have long dispensed with formal attestation even in a devise of lands, provided the authenticity of the will can be proved by at least two competent witnesses.[12]

We see, therefore, that the great weight of American legislation is against the probate of the holograph will on more proof that it is entirely written by the testator.

But, you will say, is the danger of forgery great? Does not the handwriting of the testator (assuming that the Virginia

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11. A partial list of these States is given by Schouler on Wills (5th Ed.), page 316, but I find no complete list of States recognizing holograph wills without proof by subscribing witnesses in any of the works on Wills. See also, Stimson's Am. Statute Law, § 2645, for the unique requirements of the Civil Code of Louisiana. See Louisiana Revised Civil Code, § 1567, et seq.

12. See Schouler on Wills (5th Ed.), page 317. Only this month the story is told of a Pittsburgh man, John Valentine Hood, who had his will tattooed on his back to prevent its alteration, loss or destruction. Mr. Hood is dead. The will left everything to his mother. The mother is dead. The estate is estimated at $8,000.00 (See New York World, first page, Sunday, July 2, 1916.) How can this will be probated? Of course, its authenticity must be proved by at least two witnesses, under the Pennsylvania probate statute. Apparently, the law of that State would not require that this will be signed by the testator himself, but if not signed by him, it must have been signed at the end thereof by some person in the testator's presence and by his express direction. A mark, however, is a signature. Assuming these prerequisites to probate to exist, how would the probate court preserve the original will? Evidently, an

statute be construed to require the will to be wholly in the testator's handwriting when it does not say so. See Minor on Real Property) offer as great protection against the probate of a spurious will as does the requirement of two subscribing witnesses?

Let us consider, therefore, is the holograph will adequately protected against forgery?

Is the Holograph Will Protected against Forgery?

The temptation to forge wills has often appealed with subtle force to persons least suspected of criminal tendencies. Sometime persons of respectable position and good repute have been led to commit forgery in the attempt to repair a wrong they felt had been done by the testator in the disposition of his property. Indeed, if time permitted, it could be shown that the forgery of wills is not confined to the bold, unrelated criminal who deliberately attempts to steal an estate, but that there are cases in the criminal records in which persons, who not unnaturally might be the recipients of the testator's bounty, simulate his handwriting in order to become his beneficiary.

In the very nature of things, few forged wills are contested where the disposition made of the property by the probated paper is not so unnatural as to excite suspicion, and fewer, still, are the successful contests of wills in cases of this character. Indeed, the chances of success are quite strongly in favor of one nearly connected with the testator who can shield a questioned will behind a hitherto good reputation. And yet the psychologist of crime knows that even the man of good repute too often commits a secret crime under the overpowering temptation of gain. Especially strong is this temptation when persons

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embalmer with the skill of the ancient Egyptians would be required to exercise his art without delay. Rider Haggard in "Mr. Meeson's Will," was in a similar predicament to determine how his heroine might prove the will she had submitted to be tattooed across her shoulders for the benefit of her lover and, at the same time, escape permanent confinement as an original document in the dusty archives of the Registry Office. The Registrar, touched by "beauty in distress," allowed a photograph of the will to be filed.

who have been led to expect a liberal provision in the testator's will are disappointed either by his intestacy or illiberality.

The holograph will offers a peculiar temptation to the forger when the testator does not possess a nervous, fluent, strongly characteristic handwriting, or where the testator suffers from stiffened joints or nervous debility in the hand that must guide his pen.

"That writing is imitated with the greatest difficulty which is strong, smooth, free and rapid and that cannot be correctly reproduced by a slow, careful, copying movement," says Albert S. Osborn, the accomplished handwriting expert. "And, naturally," he continues, "a hand that is slow and hesitating, and that is itself produced by interrupted, changing movement impulses is more easily imitated because its manner of production is similar to that of the imitating process." [13]

A case where the testator's hand was rheumatic was tried recently in the Circuit Court of Frederick County.[14] The testator was an old woman whose will was found written in an account book. It contained only a few words scrawled in lead pencil and left all of her property to a beloved adopted daughter and her children. It was in evidence, uncontradicted, that the testator suffered from rheumatic affection which prevented free movement of the muscles that controlled the formation of her letters in writing. There was no witness to the will and it was assailed confidently as a forgery by a sister of the deceased. All the modern devices of the handwriting expert were resorted to, such as the making of magnified photographs of the writing by document cameras, and the comparison of admitted standards under the microscope with the suspected writing. The most elaborate illustrations were made to the jury on the black board by the handwriting expert, designed to show that the handwriting in the questioned document was a patched and poor imitation of the genuine handwriting of the deceased. None of this evidence appeared to make the slightest impression upon the jury and the verdict was quite promptly found in favor of the will. In this case I am convinced from my knowledge of the parties that the will was entirely in the handwriting of the

13. Osborne's "Questioned Documents," p. 240.
14. Strother *v.* Wright.

testator, and yet it was perfectly obvious that it would be very difficult to persuade the average jury to set aside a will offered for probate by a person of previous good reputation, even though the circumstances of its production and composition were suspicious.

Another interesting case, involving the validity of a holograph will, was tried within the last year in the Corporation Court of the City of Winchester. Samuel G. Noakes, a carpenter, had accumulated considerable property. On June 17, 1912, he was married and on October 14, 1913, he died. A search failed to reveal a will and his estate was administered upon under the belief that he had died intestate. Indeed, a considerable part of his estate had been distributed, when his wife, in cleaning up his room, discovered, accidentally, in an illustrated book a post card photograph of the decedent, upon the reverse side of which was scrawled in lead pencil these words:

"June 17, 1912
Was married today my wife Annie
E. Noakes to have all I own with
out bond are serity my will.
(signed) S. G. Noakes."

On April 20, 1915, this paper was admitted to record as the true last will of said Noakes, upon testimony that it was written entirely by him. His heirs and distributees contested the will, emphasizing the alleged mental incompetency of the testator, as well as questioning the handwriting. There was an issue devisavit vel non, and the jury promptly found in favor of the will.

It may be questioned if this post-card should have been sustained as a testamentary paper had not the words "my will" appeared thereon in the handwriting of the testator. It is interesting to compare the words scrawled on this picture post-card with the words written by the railroad brakeman Smith that were considered by the Supreme Court of Appeals insufficient to show a testamentary intent in the case of Smith *v.* Smith, 112 Va. 205, 70 S. E. 491. In that case the words were: "Everything is Lou's. G. T. Smith, 314 South Patrick St., Ax., Va." It is perfectly clear that the addition of the words "my will" by Smith would have evidenced his testamentary intent and moved the court to sustain the bequest to Lou of everything the testator possessed.

It is true that in the Noakes case the words "without bond or surety" suggest that the paper was drawn with testamentary intent, even without the more convincing "my will." However this may be, it is certain that the addition of the words "my will" by Smith would have converted his written declaration "Everything is Lou's" into a valid will, and the ease with which these two words might have been supplied by the forger suggests another avenue of fraud the unwitnessed holograph will opens to the criminal.

The forger may accomplish his purpose by making a forged addition to the words in fact written by the testator.

It should be remarked that in the Noakes case the testimony abundantly justified the jury in finding in favor of the post-card will.

The Legislature may have felt that no forger would adopt the holograph will as the medium for accomplishing his purpose, and yet the very fact that the forger must have at least two confederates in order to be successful in the probate of a spurious will not pretended to be entirely in the handwriting of the testator increases his peril of discovery.

In a recent case[15] pending in the Corporation Court of Winchester, a woman produced a paper admitted to be in her own handwriting whereby the testator devised her a valuable house and lot. There were two subscribing witnesses to the will. The testator was an eccentric old lady whose mental capacity, though assailed, would have stood, in all probability, the very liberal tests of testamentary capacity established by our Supreme Court of Appeals.[16] Counsel against the will had retained an expert to

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15. In re Lucy Barrett Will.

16. A testator must have sufficient mind and memory to intelligently understand the nature of the business in which he is engaged, and to comprehend generally the nature and extent of the property which constitutes his estate and which he intends to dispose of, and to recollect the objects of his bounty, and hold them in his mind a sufficient length of time to observe their obvious relations to each other, and to be able to form some rational judgment in relation to them. Lester *v.* Simpkins, 117 Va. 55, 83 S. E. 1062. If these requisites exist the will should be upheld, although the testator was of great age and his mind enfeebled, his body debilitated and his memory not as good as formerly. Huff *v.* Welch, 115 Va. 74, 78 S. E. 573.

attack the genuineness of the signature, but it was strikingly like the genuine signature of the testator. On the very night before the trial of the issue the attesting witnesses confessed that they had not in fact seen the testator sign the paper sought to be proved as her will, but they had been persuaded by the devisee to sign as subscribing witnesses. The witnesses at the crisis of the commission of the crime had not the fortitude in evil doing to carry it to completion. Had the beneficiary accomplished a good forgery of the testator's handwriting in the body of this very brief will, her designs could not have been defeated by the awakened conscience or growing fears of the subscribing witnesses.

The criminal is instinctively secretive. His criminal purpose is born in the seclusion of his own mind, and stirred to sinister activity by the lust of gain, the pangs of disappointment, or the hope of revenge. He shrinks from sharing his dangerous design with anyone. His anxiety leads him into the curtained room, behind the locked door, where, with infinite care and shrewd precaution against suspicion, he attempts to simulate the dead hand that cannot be raised to reveal and punish his crime.

Only a few words are necessary to transmit the whole estate in the way the forger desires it to go and the difficulty of discovering the simulation of the handwriting may be increased by the bluntness of the lead pencil that is as much permitted by law as any other instrument of writing. Indeed, the difficulty of discovery when the words of a very short will are written in lead pencil is recognized by that shrewd examiner of questioned documents, Mr. Albert S. Osborn, when he says that the writing of a will in lead pencil is in itself a circumstance to excite suspicion of its genuineness. The West Virginia Supreme Court, however, does not agree with Mr. Osborn,[17] and Professor W. M. Lile says in an Editorial in 7 VIRGINIA LAW REGISTER, page 63: "That there are numerous cases sustaining the validity of wills written or signed in lead pencil where the necessary finality of testamentary intent appeared." [18]

It is urged in favor of the safety of the holograph will that,

17. LaRue *v.* Lee, 63 W. Va. 388, 60 S. E. 388, 14 L. R. A. (N. S.) 968.

18. 1 Underhill on Wills, p. 183.

fortunately, the one who produces a criminal forgery rarely has the skill to do it well and that for this reason the forgery is usually discovered.

And yet there is a case in Virginia in which a holograph will forged by a man of no expertness in handwriting was not only probated in the County Court of Fairfax County as the true last will and testament of Edmund C. Conly, but was so established by a verdict of the jury and the judgment upon that verdict affirmed by the Supreme Court of Appeals.[19] It may be remarked that the court held competent to prove the handwriting in this case a witness who stated that some thirteen years previous the testator dug a well for him and drew several orders on him for money, which he paid, and that although he never saw the testator write he believed the paper to be in the testator's handwriting because of his recollection of the writing on these orders. The paper writing probated as the will in this case was as follows:

"Lewensville,
August 19, 1862.

Dear Wife:

I am going away; I may never return. I leave my property to Gaines and Dan, dispose of it as you think fit. Don't forget sister May and Bridgit. Pay William Conly twenty doliars and Patrick Sullivan twenty five dollars.

(signed) Edmund C. Conly.

Witness: Samuel Farnsworth."

Gaines and Dan were the children of the brother of the testator's wife, whom she had taken to her house and raised and she testified that she had often heard her husband say that these two boys should have whatever he had to leave.

In all the scrutiny to which this paper was subjected in the course of the trial of the issue, no one seems to have suspected that it was not in the handwriting of the testator, and the reported case clearly shows this. Indeed, the forgery was never discovered until Thomas Kerans on his death bed confessed to Reverend Father J. D. DeWolfe that after the death of Edmund C. Conly he wrote the will that was supposed to have been written by Conly in his life time.

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19. Cody *v.* Conly, 27 Gratt. 313.

At the March term, 1876, the opinion in Cody *v.* Conly was handed down and at the January Term, 1880, we find the story of the forgery and the confession. In Judge Burk's opinion in Connolly *v.* Connolly, 32 Gratt. 657, he says this:

"After the affirmance by this court of the decree of the Circuit Court of Fairfax County in the case of Cody *v.* Conly, and others, reported in 27 Grattan, page 313, et seq., and within three years after said affirmance, the present appellant, Rosa A. Connolly, one of the heirs and next of kin of Edmund C. Connolly, presented her Bill to said Circuit Court, praying a review and reversal of the decree aforesaid, which established, on the verdict of the jury rendered on the trial of the issue directed, that a certain writing set out in the record, which had been admitted to probate in the County Court of Fairfax County, was the true last will and testament of the said Edmund C. Connolly, deceased, and praying further that an issue be ordered to be tried by a jury to ascertain whether any, and, if any, how much of the said writing was the true last will of the said Edmund Connolly, and that said writing be cancelled and declared void."

And among other grounds which the appellant predicated her prayer for a review and reversal of the decree and for an issue, was that said writing admitted to probate as the last will of Edmund Connolly was a forgery, of which Margaret Connolly, widow of the decedent, and party to the suit, had notice and in which she participated, of which fraud upon her rights she became aware by reason of the written confession of said Thomas Kerans which is as follows:

"Lewensville,
November 26, 1876.

I certify on oath that I wrote, after the death of Edmund Connolly, the will that was supposed to be written by Mr. Connolly himself.

(signed) Thomas Kerans."

The court remanded the cause to the Circuit Court with directions to receive the bill of review tendered by the appellant and permit the same to be filed and regularly proceeded with to a final decree.

It is probable that a majority of the forgeries of holograph wills are never discovered and that there are not a few cases that never rise above the trial courts of Virginia wherein wills of this character are attacked as spurious.

When Judge Keith was Judge of the Circuit Court of Loudoun County, there was an issue devisavit vel non tried before him and a jury in Leesburg, that involved a most daring and ingenious forgery of the handwriting of the late David Hixson in a paper purporting to be his holograph will. Mr. Hixson had been Sheriff of Loudoun County and died leaving an estate valued at more than one hundred thousand dollars. After his death, a thorough search failed to reveal a will and letters of administration were granted upon his estate. Mr. Hixson was an old bachelor and had lived for years in the house of a friend. Sometime after administration was granted, a paper was produced apparently entirely in the handwriting of David Hixson, that left eight thousand dollars to each of his four nephews, that gave three thousand dollars to his friend, A. J. Bradfield, who was appointed his executor, that gave one thousand dollars to each of the children of John W. Nixon, and then concluded in this way:

"Having made my home in the family of John W. Nixon for eighteen years and having always received the utmost kindness and attention in health and in sickness for which he has been but moderately compensated it is my will and desire that he shall have the remainder of my estate including my bank stock and leased property. I want no sale made of any of estate.

Given under my hand in the morning of the 10th day of February, 1883.

D. Hixson."

At a County Court held in Loudoun County on April 9, 1883, this paper was presented to the court and proved by the oaths of twelve men, several of whom I know to be men of the highest character and intelligence, to have been wholly written by the testator. There can, of course, be no question that each of these gentlemen was absolutely satisfied that the will was entirely in the handwriting of David Hixson, and yet, on May 8, 1885, a jury found in the Circuit Court of Loudoun County, that this paper was not the true last will of David Hixson.[20]

This was quite a celebrated case, in which General William H. Payne, H. B. Brook and others, appeared for the proponents of

20. A. J. Bradfield, Ex'or of David Hixson, and others, proponents in an issue out of chancery, v. Jane H. Button, Mary P. Hutchinson and others, contestants. Hon. James Keith, Judge.

the will, and Eppa Hunton, J. W. Foster and others, appeared for the contestants. Mr. Ned Hay, of Washington, D. C., a handwriting expert, testified that the will was a forgery, although I have been advised by one of the witnesses to the handwriting that it appeared to him to be the handwriting of David Hixson. The handwriting expert, however, pointed out the fact that in every instance the t's in the probated paper were crossed with an upward stroke, while numerous exhibits of the admitted genuine writing of David Hixson revealed that he invariably crossed his t's with a downward stroke.

Indeed, cases of forged wills multiply in the books until we feel uncertain of the genuineness of many papers probated as wills where there are no subscribing witnesses and the circumstances excite suspicion. The accomplished authority on "Questioned Documents," Mr. Albert S. Osborn, says:

"In these days the estates of deceased persons are the especial prey of bold adventurers, and nearly every term of court has forgery cases of high or low degree. The proportion of this class of crime has undoubtedly increased in recent years."

If this increase has occurred in many of the States of the Union where holograph wills cannot be probated unless witnessed, and where the formalities of probate are much more exacting than they are in Virginia, is it not reasonable to assume that some forged wills have been successfully probated in this State because of the absence of legislative safeguards against fraud in the execution and proof of holograph wills?

The probate practice in Virginia is quite informal. Certainly, especially before the clerk, there is no such studious inspection of holograph wills that makes it in the least probable that the simulation of the writing would be discovered. It is true the law requires the proponent of a will to prove that it is wholly written by the testator, but the Virginia statute does not even require that this proof shall be made by any stated number of witnesses. Even one will suffice if the clerk or court be satisfied.

THE HOLOGRAPH WILL MAY BE PROVED BY THE BENEFICIARY.

Indeed, it is astonishing that while the Virginia statute does not permit an attesting witness to derive any advantage from the

probate of a will in which he is interested as devisee or legatee (if his testimony be necessary to prove the will), a holograph will may be proved alone upon the testimony of the beneficiary thereunder.

Section 2529 of the Code of Virginia and Section 3883 of the Code of West Virginia provide this:

"Sect. 2529—If a will be attested by a person to whom, or to whose wife or husband, any beneficial interest in any estate is thereby devised or bequeathed, if the will may not be otherwise proved, such person shall be deemed a competent witness, but such devise or bequest shall be void, except that, if such witness would be entitled to any share of the estate of the testator in case the will were not established, so much of his share shall be saved to him as shall not exceed the value of what is so devised or bequeathed."

Judge Keith construed this statute in a very able opinion in Bruce *v.* Shuler, 108 Va. 670, 62 S. E. 973, which is annotated at length in 35 L. R. A. (New Series) 686. In that case Judge Keith says that a will, other than a holograph will in Virginia, must be proved by two competent witnesses. They must be competent at the time of the attestation, and says Judge Keith:

"Those who take under the will are incompetent, were incompetent at common law, and their incompetency is not relieved by the statute."

Indeed, the rule is now substantially universal that, unless there be a statute to the contrary, the competency of an attesting witness to a will must exist at the time of the attestation, and the general rule is, in Virginia and most of the States, that a devisee or legatee under the will is incompetent to attest, except in so far as he is made competent by statute.[21]

"The object of the statute was to prevent frauds as well as perjuries," says Judge Keith, and yet the Legislature of Virginia has wholly failed to declare void a devise or beques to a devisee or legatee who is permitted to prove that an unwitnessed will was wholly in the handwriting of the testator. It is setted law in Virginia that a devisee or legatee, who is not an attesting wit-

21. See note to Bruce *v.* Shuler, 108 Va. 670, 62 S. E. 973, 35 L. R. A. (N. S.) 686, where cases are collected from nearly all the states.

ness, is competent to be examined in support of the will, like any indifferent person and his interest is a disqualification only in case of attesting witnesses.[22]

This surprising situation permits the proponent of a holograph will, under which he has the sole interest, to prove the very thing: to-wit: the testator's handwriting, the genuineness of which dispenses with the rigid requirement of the law that the paper proposed as the will shall be proved by two wholly disinterested credible witnesses, who were present together with the testator when he executed his will.

It is perfectly obvious that the Legislature should wholly disqualify any party having an interest under a holograph will from testifying that it was wholly written by the testator; except upon condition that the devise or bequest in his favor be void. Of course, such a witness might be permitted to take what he would receive in the event that the maker of the will had died intestate.

The Weakness of Much Non-Expert Handwriting Opinion.

We have seen how the forged will in Cody *v.* Conly was proved by a witness, who had never seen the testator write, upon his statement that he thought he could identify the handwriting by his recollection of orders given him by the testator thirteen years before. And in Pepper *v.* Barnett, 22 Gratt. 405, a witness was permitted to express his opinion on the disputed handwriting, when he had only seen the party write once and who admitted that his knowledge of the handwriting was imperfect.

Indeed, the non-expert opinion on handwriting is admissible quite freely in Virginia. Although not an expert a witness may refresh his memory by examination of admittedly genuine specimens of the handwriting[23] and, even though he never saw the party write, he may testify as to the handwriting in the disputed paper if he has become familiar with the business or other papers of the party alleged to have written the questioned writing.[24]

Every lawyer experienced in the probate of papers knows

22. Martz *v.* Martz, 25 Gratt. 361, 363, 2 Minor, 1014-15.

23. Redford *v.* Peggy, 6 Rand. 316.

24. Sharp *v.* Sharp, 2 Leigh 249; Cody *v.* Conly, 27 Gratt. 313.

how easy it is to find witnesses to say that a paper is entirely in the handwriting of the testator when they have no reason to suppose the perpetration of a fraud. It may be said that the opinion of the average witness in support of the genuineness of handwriting affords little protection against forgery. The usual statement of the witness is that the writing "looks like the handwriting of the testator." Of course, the forger has spent anxious hours for the very purpose of making the writing resemble that of the testator, and even the clumsiest forger can usually accomplish a general similarity in the simulated writing to the genuine writing.

The handwriting expert, Mr. Albert S. Osborn, himself says that "when looked at as a whole, such forged documents may appear to be strikingly like the writing they were made to imitate and that the principal difficulty in examining a holograph paper is to look at one thing at a time instead of depending on the general character of the writing." [25]

And yet the average witness predicates his opinion upon the general resemblance of the handwriting to that of the testator as he recalls it. It is not easy for the man unaccustomed to the scrutiny of handwriting to detect forgeries. Professor Wigmore has told us how a Chatterton and a Junius baffled the community, and even the clumsy forgeries made by Ireland of Shakespeare's writings fooled a man as clever as old Boswell and we have the pathetic picture of him on bended knees revently kissing the pseudo writings freshly manufactured by Ireland.[26]

It is true that some protection against forgery of a holograph paper is afforded by the great advance that has been made in the study of handwriting. The handwriting expert has scored triumphs as in the discovery that the signature of William M. Rice was a traced forgery in the celebrated Rice-Patrick will case in New York City, and no less an authority than Professor John H. Wigmore, of the Northwestern University, has expressed his "profound respect for the dignity of the science and the multifarious dexterity of the art."

The handwriting expert was little regarded until comparatively recent years. At common law and in some of the States today

25. Osborn on "Questioned Documents," p. 250.

26. See Historical Documents by Scott & Daily, London, Eng.

comparison may not be made between genuine specimens of writing and the disputed writing by an expert himself unfamiliar with the handwriting in question. Indeed, in Virginia, until the case of Hanriot *v.* Sherwood, 82 Va. 1, proof of handwriting was limited to those familiar with the decedent's writing. This decision overruled the previous ones and expert testimony is now admitted in Virginia as freely as in any other State.[27] For the discussion of the whole subject of handwriting comparison, see note in 63 L. R. A. 818, and also see Professor John H. Wigmore on Evidence.

As said by Judge Lacy in Hanriot *v.* Sherwood, 82 Va. 1, 17, "to exclude the evidence of skilled persons and under the same circumstances admit that of unskilled persons who in fact have no real acquaintance with the disputed handwriting seems to be artificial and unreasonable." And in Johnson's Case, 102 Va. page 930, Judge Harrison says that it was not error to admit as evidence the other writings of the prisoner proved to be genuine and the writings of his deceased wife shown to be genuine, for the purpose of comparing by expert testimony the genuine handwriting with the handwriting of the alleged forged will, nor was it error to admit enlarged photographs of these genuine writings for the purpose of facilitating such comparison, nor was it error for the jury to take the genuine papers thus introduced to their room.

It is certainly now recognized that it is more satisfactory to allow a witness to compare the writing in issue with other writings of unquestioned authority as to genuineness than to compare it with the standard which he may have formed or retained in his mind from a knowledge of the party's handwriting.[28]

And yet we know that juries, especially in the country, are suspicious of expert evidence and cannot fail to be impressed by the mere opinion of a reputable person known to them in the community who testifies that he actually knew the handwriting of the deceased and believes the questioned document to be genuine. Then, too, it is nearly always possible to obtain experts for either side of the controversy who will advance absolutely

27. Johnson *v.* Commonwealth, 102 Va. 927, 930, 46 S. E. 789; Savage *v.* Bowen, 103 Va. 540, 49 S. E. 668; State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813.

28. Green *v.* Terwilliger (C. C.), 56 Fed. 384.

conflicting opinions to the confusion of the jury and the weakening of the expert testimony.

In conclusion of the consideration of the danger of forgery of a holograph will in Virginia, we have seen that no required number of disinterested witnesses are necessary to prove that the paper propounded as a will was written wholly by the testator; that this proof may be supplied even by the sole party interested under the paper he desires probated, and that no evidence is required that the paper claimed to be a will has been found among the valuable papers of the decedent or otherwise produced under circumstances tending to allay suspicion of its genuineness.

We have seen that the North Carolina and Tennessee statutes require proof that an unwitnessed holograph will is either found among the testator's valuable papers, or was deposited by him with another for safekeeping.[29]

Indeed, in the case of Perkins *v.* Jones, 84 Va. 358, 359, 4 S. E. 833 (Lewis, J. dissented), the unwitnessed holographic writing was sustained as the last will of the decedent, although found upon his premises among a large quantity of papers in an outhouse where the papers had been piled preparatory to a change of occupancy of the premises. These papers were at first in an old trunk into which such a quantity of the said papers had been put and the top so pushed down as to burst the top off. Subsequently, the papers were turned out of the trunk and the will was found on the top of a large pile of the papers. There was an unsigned attestation clause at the end of the will, and even if the paper was wholly written by the decedent, we cannot escape grave doubt that he intended this paper to be produced as his last will. This case illustrates the increased difficulty that arises in an unwitnessed holographic paper to determine whether it was executed with final testamentary intent.

The Difficulty of Determining Whether the Holograph Writing Was Executed with Final Testamentary Intent.

It is, of course, true that an instrument is testamentary in

29. North Carolina Revised Statutes, 1905, § 3113; Harrison *v.* Burgess, 8 N. C. 384; Brown *v.* Beaver, 48 N. C. 516, 67 Am. Dec. 255; Brogan *v.* Barnard, 115 Tenn. 260, 90 S. W. 858, 112 Am. St. Rep. 822.

character whatever its form, provided it is to become effective after death. Thus deeds of gift, agreements between parties, and even love letters have been held valid wills.[30] But in order for the instrument to operate as a will, the writing, whatever it may be, must have been written animo testandi. Where the maker of the paper calls in witnesses for the avowed purpose of attesting a paper he declares to be his will, there can be no question that he signs the writing animo testandi; but unwitnessed holograph papers have tried the ingenuity of the courts to determine whether or not they were testamentary in character.

Thus, in McBride *v.* McBride, 26 Gratt. 476, a letter was attempted to be set up as a will, but was rejected on the ground that the maker did not intend it to be a testamentary disposition of his property.

In Cody *v.* Conly, 27 Gratt. 313, however, the court established as a will a letter written by decedent to his wife.

On the other hand, in Smith *v.* Smith, 112 Va. 205, the court could not find the testamentary intent in this entry made by a railroad brakeman on the front page of a book in which, as an employee of the railroad company, he was required to keep certain records:

"Dec. 24, 1900.
Everything is Lou's.
G. T. Smith,
314 S. Patrick St.,
Ax. Va."

This entry was entirely in the handwriting of the decedent. In this case the court admitted freely evidence of the declarations of the decedent and the circumstances under which these declarations were made, but the evidence did not disclose the testamentary intent.

In the Circuit Court of Nelson County, August 1st, 1866, there was admitted to record as the last will and testament of John W. Goodwin a love letter written by a Confederate soldier to his

30. McBride *v.* McBride, 26 Gratt. 476; Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482; Sharp *v.* Sharp, 2 Leigh 249; Waller *v.* Waller, 1 Gratt. 454; Hocker *v.* Hocker, 4 Gratt. 277; Smith *v.* Smith, 112 Va. 205, 70 S. E. 491, 33 L. R. A. (New Series), 1018.

sweetheart, in which the Court found the animo testandi in these words in the postscript:

"If I do go to war and never return, you shall have the benefit of what I leave behind to your own disposal.

J. W. Goodwin." [31]

Another strange and somewhat strained case was decided by the Corporation Court of Danville at its August Term, 1898.[32] The decedent, R. T. Jones, in contemplation of death, wrote and placed in an envelope between the glass and frame of a mirror in his room a paper wherein he directed that a certain trunk be sent to Emma K. Jones. In the trunk was found a bond for eight hundred dollars made by W. T. Keeling, payable to decedent. The controversy was to determine whether Emma K. Jones was entitled to the proceeds of the bond or whether the next of kin of the decedent should share in the same equally under the statute of distributions. The court held, quite properly, that Emma K. Jones could not claim the bond as a donation causa mortis, because there was no delivery of the articles to her, either actual or constructive, but the court sustained the letter as a valid will of the bond for eight hundred dollars. This case does not appear to have reached the Supreme Court of Appeals.

Not only does the holographic paper when it is not in form a will present peculiar difficulties of determining whether or not it was executed with testamentary intent, but resort must sometime be had to evidence to show that such an instrument purporting to be a will was not intended to operate as such.

In the leading West Virginia case of LaRue *v.* Lee, 63 W. Va. 388, 60 S. E. 388 (annotated in 14 L. R. A. (New Series) 968, 19 Am. St. Rep. 973), the will was written in lead pencil, was unwitnessed and there were sundry alterations made also in lead pencil. It was sought to introduce in evidence oral declarations made by the decedent tending to impeach the idea that this altered paper was the final expression of the testator's wishes. The West Virginia Court found the paper to be a complete holograph will. Against the weight of authority (40 Cyc. 1077, 30 Am. & Eng. Enc. Law 572; Page on Wills, 43), the West Virginia Court held

31. 1 Va. Law Reg., p. 627.
32. 4 Va. Law Reg., p. 525.

inadmissible the oral declarations of the decedent to invalidate the will and said:

"To admit such declarations inconsistent with the will would be to establish a doctrine which would render useless the precautions which the law requires in making a will; for if such evidence were allowed, witnesses would constantly be introduced to set aside the most solemn testamentary instruments. The testator having shown a settled purpose that such writing should be his will, there must be shown something more than declarations inconsistent with its existence since the paper in his own handwriting and under his control was permitted to remain undisturbed by him until his death."

In Virginia the declarations of the testator would have been received as an aid to determining whether or not he intended the paper as his will. But the court would doubtless have found such evidence in LaRue *v.* Lee insufficient to reject the paper as a will. This case clearly indicates the peculiar danger of fraudulent alterations in an unwitnessed will.

The Danger of Fraudulent Alterations in an Unwitnessed Will.

Not only does the absence of witnesses to a holograph paper remove a great safeguard against forgery of the entire instrument, but when witnesses are not on guard the door is open to fraudulent erasures or alterations in a writing originally made entirely by the testator with testamentary intent.

Erasures and alterations found in a will after the death of the testator are presumed to have been made by him before execution. Especially strong is this presumption in the case of a holograph will.[33]

Under the Virginia and West Virginia statute, it is competent for a testator to revoke a will in part by erasures or cancellations, although in some jurisdictions it is held that a will is revoked as a whole if it be in part.[34] In LaRue *v.* Lee, just cited, the paper established as decedent's will was written by a man who was so ignorant that he could neither spell correctly nor express himself grammatically, and it is probable that it was put upon paper

33. Wilkes *v.* Wilkes, 115 Va. 886, 80 S. E. 745.
34. Malone *v.* Hobbs, 1 Rob. 346.

by that slow and hesitating hand that is most easily imitated. The will was not only written in pencil, but there were penciled erasures and alterations. Certainly, the opportunity for fraud in a case like this was very great. And yet the court cannot close the door on this opportunity under the statutes as they now exist in Virginia and West Virginia.

Another objection to the unwitnessed will is the ease with which it may be destroyed and the difficulty of discovering a fraud of this character.

The Increased Ease of Defeating the Testator's Intent by the Destruction of His Holograph.

The law must protect the testator against the creation of a spurious will and the perversion of a genuine will by erasures or alterations, and safeguards should also be furnished against the thwarting of the testamentary intent by the destruction of a genuine holograph will.

It would be a criminal act, fraught with grave danger of discovery, to destroy a will that had been witnessed by not less than two living persons. The fact that the testator made a will and the approximate time of its execution could be readily ascertained from these witnesses, and a starting point found for an investigation of an unexplained destruction. On the other hand, it is almost impossible to discover and bring home to the criminal the destruction of a holograph will. Of course, the inducement to the destruction of a will is often strong in one who would benefit by the intestacy of the decedent.

In the light of this somewhat prolix discussion, it is apparent that too often the provision for a holograph will permits the criminal to convert the statute of wills into a law for the consummation of fraud, when it was intended to be a law for its prevention.

Does the Doctrine of Testamentary Incorporation by Reference Apply to Holograph Wills?

Another door to fraud would be opened wide by the failure to require witnesses to a holograph will if a paper proved to be wholly in the handwriting of the testator were permitted to in-

corporate as a part thereof a paper not written wholly by the testator.

In an article in the May 1916 number of the *Virginia Law Review*, Professor Armistead Dobie says that this question is not without difficulty and cites Plummel's Estate, 151 Cal. 77, 90 Pac. 192, 120 Am. St. Rep. 100, as seeming to hold in favor of incorporation in such a case. In this connection, Professor Dobie says that the only safeguard against forgery and fraud, besides the testator's signature in a holograph will, is a requirement that the whole will must be written by the testator.

In Gibson *v.* Gibson, 28 Gratt. 44, the Supreme Court of Appeals declined to permit the incorporation of the non-holographic writing into the holographic paper.

In this case Elizabeth Holmes gave all her estate, both real and personal, to her two sisters, Margaret and Sallie, in a paper that was neither in her handwriting nor signed by her. About an inch below and on the same sheet of paper, she wrote wholly in her handwriting and signed the following words:

"As Margaret is dead, I give her share to my niece, Lizzie Leigh Gibson."

Judge Anderson says:

"Though paper number one is not authenticated under the statute as a valid will, it is in evidence, and I thought might be referred to to show who was meant by 'Margaret' and what was meant by 'her share.' * * * But my brethern regarding number two (the words wholly in the testator's handwriting) as too vague and indefinite to be established as a will by itself and that it cannot be taken in connection with number one as that is not in the handwriting of the decedent, do not concur in this view and are of opinion that neither number one nor number two nor both taken together is a valid will under the statute, and that the judgment of the court below must be affirmed."

SUGGESTED LEGISLATION CONCERNING HOLOGRAPH WILLS.

There is only one way to protect the holograph will against fraud and forgery and that is to require that it be witnessed like any other will in order to be probated in Virginia.

I am convinced that the Virginia Legislature should follow two-thirds of the States of the Union and England and refuse to

permit the probate of the unwitnessed holograph paper. But if the power of precedent and dread of change operate against this radical step, then, at least, the Legislature should provide some barriers against forgery and fraud, to-wit:

(a) The statute should expressly require that the entire will be in the *handwriting* of the testator and not merely "wholly written" by him;

(b) The statute should require that the handwriting be proved by at least two disinterested witnesses;

(c) No party in interest under the will should be admitted as a witness in favor of the handwriting;

(d) No party, who is the father, mother, child, brother, sister, wife, or husband, of one having an interest under the proposed will, should be admitted to testify in support of the handwriting;

(e) As an additional safeguard, proof should be required either that the will was deposited with a disinterested third party by the testator, to be produced as his will after his death, or that it was found among the decedent's valuable papers, or in some other place indicating its deposit there by him with final testamentary intent.

The statute embodying these proposals, by its very language, should not become effective for one year after it becomes a law, in order to give ample notice of its adoption.

It may be objected that the conclusiveness of probate proceedings might be affected by the failure of a careless clerk to comply with the provisions of the statute I have suggested. The obvious answer to any apprehensions of this character is that a judgment admitting a will to probate or rejecting a will cannot be questioned except in the method prescribed by statute and is conclusive and final upon all parties, even upon those not formal parties to the immediate proceedings.

There is nothing better established in Virginia than that the probate procedure cannot be impeached collaterally. Unless objection to the improper probate be made within the time and in the manner prescribed by the statute, not even the most glaring error can be urged successfully against the finality of the probate proceeding.

Where a will of lands was admitted to probate, although at-

tested by only one witness, the court held it unimpeachable, and even where the court admitting the will to probate had no territorial jurisdiction under the statute, the will was not permitted to be disturbed. Indeed, prolific in error as probate proceedings have been, collateral attack thereon has always been repulsed by the courts.[35]

It is obvious, therefore, that the finality and conclusiveness of the probate proceedings would not be disturbed by the legislation herein suggested. As a rule, however, the clerks and the courts would follow conscientiously the statute and would not permit the holograph will to be probated unless the proof were offered required by the proposed legislation.

In order to guide clerks in probate proceedings, it might be well to insert in the statute the questions that should be addressed to the witnesses who appear in support of the handwriting and of the production of the will as required. These questions could be made simple and the answers of the witnesses thereto should be filed as a part of the record of the probate proceeding. Anyone suspicious of the genuineness of the will would have the advantage of examining the file of this testimony before determining whether or not an appeal should be had from the clerk probate to the court. A similar provision should also preserve the testimony of the witnesses in support of the court probate of the will.

Needed Amendments to the Statute Providing for Contests of a Will When Probated by the Clerk or by the Court.

In Virginia, the clerk may admit wills to probate under Section 2533, both in vacation and during the session of the court, with like effect as the court could do in session; but the situation of the party desiring to contest the will is very different where it has been admitted to probate by the clerk and where it has been admitted to probate by the court. Let us examine these differences:

35. Connolly *v.* Connolly, 32 Gratt. 657; Norvell *v.* Lessueur, 33 Gratt. 222; Ballow *v.* Hudson, 13 Gratt. 672; Schultz *v.* Schultz, 10 Gratt. 358; Parker *v.* Brown, 6 Gratt. 554; Saunders *v.* Linck, 114 Va. 285, 76 S. E. 327.

(a) If the will be probated by the clerk, his judgment is not subject to attack at all by the accustomed procedure of filing a bill in equity and thereon having an issue devisavit vel non;

(b) But any person in interest may appeal, as a matter of right, to the court, whose clerk made the probate, within a year, upon giving a bond as provided by law; whereupon, the clerk enters an order allowing the appeal and dockets it as a preferred cause for trial at the next term of the court (Section 2639-a). The court then hears the appeal de novo, although the proceeding "is not the bringing of a new suit but a prolongation and continuance of the old one." (Keith J. in Tyson *v.* Scott, 116 Va. 243, 81 S. E. 57.)

(c) Apparently there is no provision for formulating an issue to be tried by a jury; "the court then hears the appeal de novo." Tyson *v.* Scott, supra.

(d) From the judgment of the clerk there is no saving in favor of infants and non-residents, as is provided where there is a probate of the will ex parte in court under section 2544 of the Code, or even a probate under Sections 2538, 2539, 2540, 2541, 2542, 2543. Under Section 2540, any person interested in such probate by the court may be summoned, or, if a non-resident, proceeded against by order of publication; and to any such person so interested who is an infant or of unsound mind, a guardian ad litem may be assigned. In other words, even when the infant has been a party by guardian ad litem to the court probate, he may file a bill in equity to impeach or establish the will within one year after he becomes of age. But there is no saving in favor of infants, non-residents, or insane persons where the probate is a purely ex parte proceeding before the clerk; often more or less secret and usually quite informal as it is. There is no saving in this section in favor of an insane person in the event of and after restoration to sanity.

Now, whereas, the appeal from the clerk's probate order must be noted in one year and a bond is required, less confidence appears to have been placed in the probate by the court, for section 2544 provides that a person interested who was not a party to the probate proceedings "may, within two years, proceed by bill in

equity to impeach or establish the will, on which bill a trial by jury shall be ordered, to ascertain whether any, and, if any, how much of what was so offered for probate be the will of the decedent."

Moreover, as we have already seen, Section 2545 saves the infant interested in the will or probate by the court the right "to file a bill in equity to impeach or establish the will within one year after he becomes of age," while the probate before the clerk, after the lapse of the year within which an appeal must be taken, concludes the right of the infant to attack the will.

Section 2545 also permits any person interested, who, at that time resides out of this State, or shall have been proceeded against by order of publication, unless he actually appears a party or was personally summoned, to file a bill in equity to impeach or establish the will within two years after such sentence or order by the court admitting it to probate; but there is no such saving in favor of non-residents where the will is admitted to probate by the clerk.

It must be apparent that the legislative mind did not for a moment intend to create this confused and unfortunate condition in the probate statute. Nevertheless, although the crying need of a remedy has been heard by the Legislature, no curative bill has been passed.

Indeed, in February 1911, the Editor-in-chief of the VIRGINIA LAW REGISTER (Vol. XVI, p. 784) called attention to the fact "that no bill in equity can lie to the clerk's decision," but already, in September 1909, Maggie Link, child of William A. Huffman, whose will had been probated by the clerk of the Circuit Court of Giles County, had brought a suit in equity in the Circuit Court of Giles County, insisting that the subsequent marriage of the testator had operated a revocation of his will under Section 2517, and praying that the will might be treated as a nullity. Under the will attacked, Mary S. Saunders (whom the testator subsequently married) took the entire estate and from her as devisee C. A. Saunders had accepted a deed to a part of decedent's land and this deed the contestant of the will sought to have set aside. Saunders demurred on the ground that the will had been admitted to probate by the clerk, and no appeal having been taken from

the order within the year, as provided by statute, the sentence was final and conclusive and was not amenable to collateral attack; consequently the Circuit Court was without jurisdiction to maintain the suit. When the case reached the Supreme Court of Appeals, the soundness of this position was sustained.[36]

In the later case of Tyson, Clerk *v.* Scott, 116 Va. 243, 247, 81 S. E. 57, Judge Keith says this:

"The Section of the Code (2639-a), by virtue of which clerks of the Circuit and Corporation courts are authorized to admit wills to probate, was before this court in the case of Saunders *v.* Link, where it was held that an order of a clerk of a circuit court admitting a will to probate ex parte, from which no appeal is taken in the manner prescribed by section 2639-a of the Code (1904), is final and conclusive and cannot be collaterally attacked. No bill to impeach the will lies under Section 2544 of the Code. The latter section applies only to ex parte probates in court, under that section. A clear distinction is drawn in the statutes between an ex parte probate before a clerk, which is provided for by Section 2639-a, supra, and a probate before a court, which is provided for by Section 2544, supra."

Obviously, the statutes under consideration should be so amended as to permit anyone not a party to the probate before the clerk to file a bill in equity within two years either to impeach or establish the will, in the same way that he can now do where the probate proceedings have been had in court. It may be that one year is sufficient time within which to permit the bill to be filed; but when we consider the conclusive force of probate proceedings, it would doubtless be wiser to give two years within which to assail the probate of a will, whether made by the clerk or in court.

Certainly, the procedure either to impeach or establish the will should be the same whether the probate be made by the court or by the clerk. Then, too, the saving made by section 2545 in favor of infants and non-residents should be enlarged to include insane persons within a reasonable time after restoration to sanity and made available where the will has been admitted to probate either by the clerk or the court.

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36. Saunders *v.* Link, 114 Va. 285, 76 S. E. 327.

SUGGESTED AMENDMENTS TO THE STATUTE TO PROTECT THE TITLE OF A BONA FIDE PURCHASER OF REAL ESTATE FOR VALUE FROM THE HEIR AT LAW OF DECEDENT AGAINST A DEVISEE OF SAID REALTY WITHOUT NOTICE TO SUCH PURCHASER.

In Section 2457-a, the Legislature sought to protect bona fide purchasers for value of realty from an heir at law against the danger of an after-discovered will that might show the title to be in someone other than the heir.

Up to the amendment that became effective in June, 1914, this statute provided that the title of a bona fide purchaser without notice for valuable consideration from the heir at law should not be affected by a devise of such realty made by the decedent unless the will devising the same were probated within seven years after the testator's death. By amendment, this period is reduced to two years, and anyone having the status of a bona fide purchaser for value and without notice may purchase realty with perfect safety from an heir at law after the lapse of two years from the death of the party from whom the heir inherits. The statute is one of repose and the reduction from seven to two years is wise.[37]

The draftsman of the 1914 amendment, however, appears to

37. The legislature in the amendment approved March 25th, 1914, clearly evidenced its intent that the two year limitation should operate retrospectively; the title of the purchaser from "the heir at law of a person who has died *heretofore* or who may die hereafter" shall not be affected by a devise unless the will be offered for probate within two years after the testator's death. Suppose a case where the heirs-at-law of the supposed intestate (who dies before the reduction of this limitation from seven years to two) sell the realty to bona fide purchasers for value without notice and then a will is discovered devising the land to parties other than the heirs. The will is probated more than two years after the testator's death and after the reduction of the limitation to two years. The purchaser from the heirs pleads the two-year statute to the devisee's action to recover the land. The testator died when the seven-year statute was in force; his will is not discovered until more than two years after his death when the two-year statute operating retrospectively has become law. Is the reduced limitation constitutional quoad this case under the general rule that a new limitation, when made to apply to existing rights, must allow a reasonable time before it takes effect in which such rights may be asserted? See Terry *v.* Anderson, 95 V. S. 628; 24 Law Ed. 365. As Section 53 of the Virginia Constitution prescribes that no law, except a general appro-

have overlooked the failure of this section of the Code to protect bona fide purchasers from devisees under a will first probated against the danger of the probate of a later will that might well leave the property to other devisees than those named in the first will. Many men make many wills and forget to destroy them. It is perfectly possible for a will to be found and probated that is believed to be the true last will of the testator. Under this will, a devisee may sell real estate, and, soon after the sale, a new will may be found that devises the property to a wholly different person. In this event, of course, the last will would be the true will, as it could not be reconciled with the will made by the testator at an earlier time and first probated.

It is true that Page on Wills, Section 321, says that the subsequent admission of a will to probate stands on the same footing as the institution of a contest of the will already probated, especially if the two wills are inconsistent with each other; hence the latter will must be offered for probate within the time limited for a contest, which, in Virginia, as we have seen, would be two years from a court probate and only one year by means of an appeal from a clerk probate. This, however, does not appear to be the law in Virginia, for in Schultz *v.* Schultz, 10 Grat. 358, the court held that the probate might open to admit of proof that an after-discovered paper was the testator's genuine will. The will subsequently discovered would not annul the first will, but all the

priation law, shall become effective until ninety days after adjournment and as this two-year amendment did not contain an emergency clause, was this not a conclusive determination of ninety days as a reasonable time within which an existing right must be asserted after the enactment of the two-year statute; or is it necessary to its constitutionality (read retrospectively) that the act itself reducing the limitation give in express terms a specific time—and that a reasonable time—within which the reduced period shall bar rights existing before its enactment? That the constitutional ninety days is sufficient even where the act itself prescribes no time within which it shall become law, see Mulvey *v.* City of Boston, 197 Mass. 178, 83 N. E. 402. Nevertheless, the Virginia legislature in 1916 again amended this section by providing that "in case two years have already elapsed since the testator's death, within thirty days from the date this act takes effect," the will devising the same shall be filed for probate.

testamentary papers, even though probated at different times, would be read together as the will of the testator. Where the provisions of the after-discovered will could not be reconciled with those in the first probated, however, it is submitted that the last will must control, under the authority of Schultz *v.* Schultz. For example: if the will first probated devised all the testator's realty to his wife, Mary, and thereafter a will proved to be of subsequent date expressly revoked all wills formerly made and devised all of the testator's realty to his son, John, it would appear that the title to the realty would be held to have vested in John at the date of the testator's death. In the meantime, parties wholly innocent of the existence of the after-discovered will might have purchased the realty from the devisee under the will first probated.

In the interest of the repose of title to realty and in order to avoid the mischief that results from the discovery of a will long after the death of the testator, it is submitted that the rule stated by Page should be made statutory in Virginia.

The doubt and confusion arising from the opinion in Schultz *v.* Schultz, supra, can be wholly removed by a legislative declaration that the subsequent admission of a will to probate shall stand on the same footing as the institution of a contest of the will already probated. This is logical because the only purpose of the production of the second will is to change the provisions of the first will in whole or in part. In other words, the statute should give two years from the death of the decedent to produce all testamentary papers. Within the two years, all papers claimed to be testamentary, whether executed simultaneously or in succession, should be offered for probate and the court would read them together in order to ascertain the will of the testator; but after two years from the death of the decedent, the world, as well as the parties in interest, should know that there is no danger of another paper being produced that could by any possibility be probated as the true last will of the decedent.

THE STATUTE SHOULD REQUIRE THE APPLICATION FOR PROBATE OF A WILL TO BE MADE WITHIN TWO YEARS AFTER THE DEATH OF THE TESTATOR.

I have little doubt that the Bar of the State will generally agree

to the embodiment in our statute of the rule stated by Page. If, then, it be wise to protect parties under a will duly probated from the discovery of a different will more than two years after the death of the testator, why is it not equally wise and equally logical to protect heirs and distributees against the probate of a will more than two years after the death of the supposed intestate? As we have already shown, our probate statute does not permit anyone to die without a will, for, if a man do not make a will for himself the law makes one for him; if the decedent do not make an express disposition of his property, the statute of descents and distributions presumes the will of the decedent in the tender light of the natural affections. In either case, whether the party die testate or intestate, the succession follows the law, and the mischief and injustice that results when wills are discovered and probated many years after the heirs and distributees have proceeded in good faith in the use and enjoyment of the supposed intestate's property, should constrain the Legislature to make perfectly definite the time within which a will must be probated in Virginia.

In Texas the application for the probate of a will must be made within four years from the date of the death of the testator; but there is a saving in favor of infants and persons under disability.

The policy of the law is to protect the title to property against disturbance and it is monstrous that a will be permitted to be probated more than twenty years after the decedent's death that operates a revolution in the title of heirs and the interest of distributees of the supposed intestate, as was done in the case of Craufurd *v.* Smith, 93 Va. 623, 23 S. E. 235, 25 S. E. 657.

David Craufurd, of Prince George County, Maryland, died, believed to be intestate, in the latter part of 1860 or 1861, leaving a large estate, consisting of lands, slaves and other personal property. In 1861 his slaves were divided by his administrator amongst his next of kin as his distributees. Not until August 16, 1881, more than twenty years after the death of David Craufurd, was a paper received through the mail, from an anonymous source, that turned out to be his last will. This will was admitted to probate in the proper court of the State of Maryland on the 16th of August, 1881, and on December 12th following, an authenticated copy was probated in the county court of Clarke County, Virginia.

It may be remarked in passing that had the genuineness of this will been suspected, there would have been no certain way, under the Virginia statute, to have assailed it. (See discussion ante).

Mrs. Smith, wife of Treadwell Smith, was not one of the beneficiaries under the after discovered will, but she had received a part of the estate as distributee upon the assumption that he had died intestate. It was charged that Smith had received a considerable sum in the right of his wife as one of the supposed distributees of Craufurd and the proceeding was to subject Smith's lands to the payment of this and other debts. Smith had died in the meantime, and his executor and some of the devisees relied upon the statute of limitations and laches as defenses. Judge Buchanan said in delivering the opinion of the court:

"Having received from Craufurd's estate, by mutual mistake of fact, money and slaves to which he was not entitled, and having sold some of the slaves and converted the proceeds to his own use, his estate (meaning Smith's), upon the discovery of the mistake, became accountable to the estate of Craufurd therefor, both in morals and in law. * * * The personal estate of David Craufurd, deceased, having been distributed amongst his next of kin and distributees, under a common or mutual mistake as to the rights of the parties, the statute of limitations did not begin to run until the mistake was made known by the discovery of the will. The remedy in a case of mutual mistake, so far as affected by the statute of limitations, seems to be governed by the same principle as in a case of fraud, viz: that the rights of the parties to such mistake are not affected by the lapse of time, or generally speaking, by anything done, or omitted to be done, so long as the parties remain, without any fault of their own, in ignorance of the mistake which has been committed. * * * The statute of limitations did not, therefore, begin to run against the claim asserted by Craufurd's administrator until in the year 1881, when the will was found. Prior to that time, this suit was instituted."

The court recognizes that "until Treadwell Smith knew that the will had been found and that his wife was not one of the beneficiaries under it, he was under no obligation to restore what he had received, and there was no one to whom he could restore it;" hence, the court held that interest could not be allowed except from the time when the will was discovered and demand made for the amount ascertained to be due by Smith's estate.

The limits of this paper, already strained, will not permit the

discussion of other cases that would emphasize the reason for the enactment of a statute limiting the right to probate a will within two years from the death of the decedent.

In a Will Contest the Issue Should Include All Papers Alleged to Be Testamentary.

In a will contest the issue should include all papers alleged to be testamentary. The Code of Virginia provides for an inter partes probate by Sections 2538, 2539, 2540, 2541, 2542, and 2543. A person offering the clerk or the court a will for probate may obtain from the clerk process directed to the proper officer, summoning any person interested to appear at the next term of the court to show cause why the will should not be admitted to record, and the court may cause all persons interested in the probate to be summoned to appear on a certain day. When proper parties are made, the court may proceed to hear the motion for such probate, or, if any person interested ask it, it may order a jury trial. In a proceeding of this character all papers claimed to be testamentary are produced and the jury, or the court, if no jury be requested, ascertains (Section 2542) "whether any paper, or if there be more than one, which of the papers produced be the will of the decedent."

And yet, as we know, most wills are probated in ex parte proceedings before either the clerk or the court, and where the will has been probated in an ex parte proceeding before the court, the customary method of attack is by bill in chancery, resulting in the trial of the issue devisavit vel non. In this issue the inquiry is confined to the identical papers which were probated or rejected in the ex parte proceeding. By the very terms of the statute, the jury is directed to ascertain if the paper, or any part thereof, "so offered for probate" is the true last will and testament of the decedent. The court may not require the production of all testamentary papers as it may do in the inter partes probate.

Indeed, the West Virginia Court has refused to consider as within the issue the validity of another paper even when the second paper had been admitted to probate.[38] It is true that the paper first probated in this case was a copy only, and that the

38. Childers *v.* Milam, 68 W. Va. 503, 70 S. E. 118.

paper subsequently probated was alleged to be the genuine will. The West Virginia Court does not draw a distinction on this ground, however, but says broadly that "questions in relation to the validity of the probate of another paper were not properly cognizable in this case." Doubtless, the Virginia court would thus hold only when the second paper had not already been admitted to probate.

The doctrine as above quoted from the court of West Virginia is certainly extreme where both papers alleged to be testamentary have already been probated ex parte. As we have seen, subsequent testamentary papers are admitted to probate not in exclusion of the will first recorded, but to be read in connection therewith, and all the papers so admitted to probate are to be considered as the will of the testator; hence testamentary papers, whether probated simultaneously or in succession, are all to be considered as a part of the testator's will, to the extent that their provisions may be reconciled when read together.

A somewhat similar question was presented to Judge Thomas W. Harrison in the Circuit Court of Clarke County in the Meade will case.[39] In this case certain heirs sought to impeach a probated will on the ground of the testator's mental incompetency to make a will and undue influence exercised upon him. It appeared that Meade had executed an earlier will, when his health was much better, in which the dispositions of his property were similar to those made in the will already probated. The proponents of the will under attack probated this earlier will and brought it to the attention of the court. Thereupon, the Circuit Court of Clarke County required the contestants to amend their bill and impeach this subsequently probated paper, and this was done. The Supreme Court of Appeals affirmed the case in general language, but did not expressly pass upon the propriety of the requirement by the lower court that the contestants should impeach the subsequently probated paper. The failure of the court to express any disapproval of this course, however, suggests that the Virginia Court will rule as did the Circuit Court of Clarke County when this question is presented to it directly.

Certainly, however, the matter under discussion is not free from

39. Meade *v.* Meade, 111 Va. 451, 69 S. E. 330.

doubt in Virginia, although a statute designed to remove the uncertainty must be drawn with great care or it may create rather than compose litigation.

THE PROBATE STATUTE SHOULD PROVIDE THE METHOD OF QUESTIONING THE PROBATE OF A FOREIGN WILL.

In Virginia, Section 2536 of the Code provides for the ancillary probate of foreign wills.[40] This section permits a certificate of probate from the foreign court, together with an authenticated copy of the will, showing that the will was duly executed and admitted to probate as a will of personalty in the state or country of the testator's domicil, to be admitted to probate by the Virginia court or clerk as a will of personalty in Virginia, and if it appear from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands by the law of Virginia, such copy may be admitted to probate in this State as a will of realty.

West Virginia has a similar statute,[41] but it is strange that

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40. "Sec. 2536—Probate of Copy of Will Proved without the State; to What Extent Admitted to Probate.—Where a will relative to estate within this state has been proved without the same, an authenticated copy thereof, and the certificate of probate thereof, may be offered for probate in this state. When such copy is so offered, the court, or clerk thereof, to which it is so offered, shall presume, in the absence of evidence to the contrary, that the will was duly executed and admitted to probate as a will of personalty in the state or country of the testator's domicile, and shall admit such copy to probate as a will of personalty in this state. And if it appear from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this state by the law thereof, such copy may be admitted to probate as a will of real estate. That the admission to probate of any such copy of a will since the 15th day of May, nineteen hundred and three, by the clerk of any court in this state authorized to admit any such copy of a will to probate is hereby validated, and the probate of any such copy of a will before any such clerk since said date shall have the same legal operation and effect as if such copy had been admitted to probate by said court.

41. Sec. 3890. Copy of Foreign Will or Probate—Relief against Probate. Where a will relative to estate within this state has been proved without the same, an authenticated copy and the certificate of probate thereof, may be offered for probate in this state. When such copy is so offered, the court to which, or the clerk to whom, it

while the West Virginia statute provides a method for contesting the validity of the probate of the foreign will, in Virginia there is no statute distinctly providing a method of contest. In Chapter 104, Section 16, First Revised Code 1819, it was provided that the probate of the authenticated copy might be contested in the same manner as the original might have been; but the statute in the Code of 1849 failed to provide any method of contest, and since that Code no direct method of impeachment of such copy is found in any act of the Virginia Legislature.

It is true that Section 2544 provides that wills may be impeached by bill in chancery, but, as we have seen, this statute certainly would not be applicable to ancillary probate before the clerk and there is grave doubt that it would furnish a method of contest even when the authenticated copy has been admitted to probate by the court. This doubt arises out of the fact that Section 2544 gives a party interested the right to impeach the validity of the will only "after a sentence or order under this section." Does not this language limit the remedy to a probate of a will "under this section?" If so, then Section 2544 would not apply, for that section makes no provision for a sentence or order in reference to the ancillary probate of foreign wills.

It is true that the Illinois Court construed a statute somewhat similar to the Virginia statute, though broader in some of its provisions, to authorize the impeachment of the ancillary probate by bill in equity.[42]

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is so offered, shall presume, in the absence of evidence to the contrary, that the will was duly executed and admitted to probate, as a will of personalty, in the state or country of the testator's domicile, and shall admit such copy to probate as a will of personalty in this State; and if it appear from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this state by the law thereof, such copy may be admitted to probate as a will of real estate. But any person interested may, within five years from the time such authenticated copy is admitted to record, upon reasonable notice to the parties interested, have the order admitting the same set aside, upon due and satisfactory proof that such authenticated copy was not a true copy of such will, or that the probate of such will has been set aside by the court by which it was admitted to probate, or that such probate was improperly made.

42. Dibble *v.* Winter, 247 Ill. 243, 93 N. E. 145.

At best, it is doubtful whether there is in Virginia any method of questioning the probate of the authenticated copy of a will that has been duly probated in another State.[43]

In West Virginia, the statute expressly gives the right of contesting the validity of the probate of a foreign will to a person interested, within five years, upon reasonable notice to the parties interested, upon the following grounds:

(a) That such authenticated copy was not a true copy;

(b) That the probate of such will has been set aside by the court by which it was admitted to probate;

(c) That such probate was improperly made.

For West Virginia cases on this subject see Woofter *v.* Matz, 71 W. Va. 63, 76 S. E. 131; McVey *v.* Butcher, 72 W. Va. 526, 78 S. E. 691.

It is perfectly apparent that the Code in Virginia should be amended to provide a plain, simple and effective method of contesting the ancillary probate of an authenticated copy of a foreign will.

In Conclusion.

And now, as I close, I cannot think coldly of the many will cases, whose dead, forgotten actors have in a way lived again for me. Between the dry details sometime appears the testator whose disturbed spirit hovers in anxious pain about the wreck of his intention wrought by the probate of a forgotten will. Again, I see another spirit, impotent in its rage to reveal the forger who has stolen the riches heaped up with infinite sacrifice for a gift of eternal love. And yet again there comes, in the poignant pain of vain regret, that man who in a moment of jealousy blighted the future of a young wife, or in an hour of anger imposed poverty upon a beloved but erring child. Like old Peter Grimm, in Belasco's play, they may survey the wreck of their hopes for those left behind, but may not speak the word to right the wrong. And yet, dumb as are their physical tongues, they do speak with a controlling voice in the affairs of living men, and, palsied as are their muscles in the cerements of the grave, the hand that held the testamentary pen yet rests heavy upon the living.

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43. Upon this general subject see note in 7 Ann. Cases, 306, to ex parte Clark.

Would there not be more peace among their troubled spirits were the act of making words to live with a power so great hedged about at least by the requirement that witnesses bring protection and deliberation to the solemn ceremony; protection against the criminal without any deliberation to the testator in the irrevocable act. For this word, spoken into the universal ear, is very powerful, very solemn, and may not be recalled:

> "The Moving Finger writes; and, having writ,
> Moves on; nor all your Piety nor Wit
> Shall lure it back to cancel half a line,
> Nor all your Tears wash out a Word of it."

R. GRAY WILLIAMS.

Winchester, Va.